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Supreme Court, U. S.
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FEB 2 1920
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IN THE

SUPREME COURT OF THE UNITED STATES

SITTING IN EQUITY.

No. 22, ORIGINAL, OCTOBER TERM, 1919.

THE COMMONWEALTH OF PENNSYLVANIA,
v. Complainant,
THE STATE OF WEST VIRGINIA, Defendant.

No. 24, ORIGINAL, OCTOBER TERM, 1919.

THE STATE OF OHIO, Complainant,
v.
THE STATE OF WEST VIRGINIA, Defendant.

Brief of Complainants in Support of Their Motion for Appointment of a Special Master and in Opposition to the Motion of the Defendant for the Appointment of a Commissioner, Etc.

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Complainant,
v.
THE STATE OF WEST VIRGINIA,
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1st. Both complainants and defendants agree that some authority must be appointed to take the proofs on the issues raised by the pleadings. They differ in this: shall the authority so to be appointed in accordance with the prayer of complainants, for the convenience of this Court also ascertain and report the facts, following the

established practice of this Court appointing Masters, or shall such authority in accordance with the prayer of defendant, only take the proofs and pile up the same in this Court, leaving to this Court, the burdensome detail of digging out therefrom the findings of fact necessary to the decision of the law of this controversy. The issues of fact raised by the pleadings (as the defendant qualifies substantially every admission), will necessitate the taking by complainant of a large volume of testimony. The extent thereof can not now be measured.

Either some authority, appointed by this Court, or this Court itself, must digest and analyze this testimony and ascertain and find the facts, before the legal questions in controversy can be considered. The complainants move for the appointment of a "Master," the defendant for a "Commissioner" so called, but really for an "Examiner," as these officers were known to the old chancery practice. The Examiner under the practice in chancery was a mere scrivener to put down all that the witnesses said, without power to rule upon the admissibility of their evidence, whereas the Master not only ruled upon the admissibility of the evidence but having seen and heard the witnesses, made a report or findings of fact from such evidence. This distinction is preserved in the Rules prescribed by this Court for the Courts of Equity of the United States. To run through the conduit of a mere "Commissioner" or "Examiner" into the lap of this Court—the enormous volume of proof that must necessarily be taken, and then expect this Court first to pass upon the admissibility of testimony, and then to digest and analyze the same, then to make findings of fact for the application of the legal principles involved, would burden this Court with an immense amount of unnecessary detail. It would subserve no useful purpose when, under the approved practice in

chancery, established these many generations, and frequently followed by this Court, a special master, as prayed for by the complainant, could take the proofs, rule upon the admissibility of evidence, ascertain and report the facts, and return his findings together with the evidence to this Court.

In *Kimberly vs. Arms,* 129 U. S., 512, at page 523, Mr. Justice Field said:

> "A master in chancery is an officer appointed by the Court to assist it in various proceedings incidental to the progress of a cause before it, and is usually employed to take and state accounts, to take and report testimony, * * * and similar services."

In *Davis vs. Schwartz,* 155 U. S., 631, after citing the foregoing case, Mr. Justice Brown refers to the distinction between the findings of a Master *"under the usual order to take and report testimony"* and his findings when the order is made by the consent of parties.

In *Hope Manufacturing Company vs. Traction Company,* 245 Federal Reporter 355, the opinion of the Court, vindicated by a wealth of citations, is summarized in the syllabus, which is as follows:

> "There is nothing in the new equity rules (198 Fed. xix; 115 C. C. A. xix) which deprives a federal court of equity of the discretionary power previously recognized and exercised to refer a case to a master, without consent of the parties, to hear the evidence in full and report his findings and conclusions on the whole case; but in such case his findings and conclusions are advisory only, and fully reviewable by the Court."

In one of the earlier cases *State vs. Bridge Co.*, 9 Howard 647, referred to in *Missouri vs. Illinois & Chicago District*, 180 U. S. 208, at page 227, the officer appointed to take and report proofs, etc., was called a "Commissioner," though he had the powers of a Master.

Rules of Practice in Equity for the U. S. Circuit and District Court provide Rules 59-68, inclusive, for the appointment of Masters, the procedure before them, their powers, duties, etc.

The citations of defendant in its brief (Caption II, title, Appointment of Commissioner, pages 2-4) do not militate against the application of complainants for the appointment of a Master instead of a Commissioner or Examiner.

In none of these citations is the question either of power or propriety raised. In some cases a Master, in some cases a Commissioner was appointed. In some cases by consent, in others without objection, in still others because the situation warranted, or the appointee was called a Commissioner, but given the powers of a Master.

Fourteen cases are cited. Five under sub-heading (a) "In the following cases a Commissioner was appointed or provided for" and nine under sub-heading (b) "In the following cases though involving in several instances conflicting evidence, the proofs were taken in the ordinary way, as the reports do not intimate that a Commissioner or Master was appointed."

Of these fourteen cases, eleven present the single question of boundary line between states.

Of the five cases where Commissioners were appointed, the following will be found as the facts. In *Washington vs. Oregon* the Commissioner was appointed *by consent;* in *Kansas vs. Colorado* it does not appear whether or not the Commissioner was appointed by consent or that any question was raised whether a Master or Commissioner should be appointed; in *South Dakota vs. North Carolina* the Commissioners were agreed to by the parties and the testimony was taken under the direction of the Court; in *New York vs. New Jersey* while the officer was called a Commissioner he was appointed "with the powers of a Master in Chancery as provided in the rules of this Court"; in *Florida vs. Georgia* the question was the right of the Attorney General to be heard in behalf of the United States in the boundary dispute, and it does not appear how the evidence was taken under the leave to adduce evidence, written or parole and to examine witnesses and take and file depositions, on the right of the Attorney General to be heard.

The nine cases referred to by defendant under its sub-head (b) furnish still less light.

In all of these cases the only issue of fact presented was the true boundary line between states. In none of them does it appear how the testimony was taken, whether by Commissioner or Master, whether by appointments by consent or otherwise, or that any question arose as to the powers of the authority to take the testimony, or how it should be taken.

The other cases cited in its brief by defendant, where Masters were appointed confirm complainants' contention and the authorities cited in their brief to the

effect that a Master, under the facts of this controversy, is the proper officer to take the proofs and report the same to the Court.

2nd. The motion of the defendant for *the general* consolidation of the cases is opposed. Complainants pray for the consolidation for the taking of proofs, the evidence so taken to be filed in each case. There are certain distinctive differences in the two cases, fundamental to the relief prayed for, to wit, the number of consumers in each complainant state, the effect upon them respectively of the enforcement of the West Virginia Act, the amount of gas obtainable from other states than West Virginia, available in each of said complainant states, the degree of dependence for gas respectively of said complainant states on the State of West Virginia, and other questions peculiar to the situation of each of said complainants. If, upon the coming in of the proofs and upon the report of the Master, this Court should then be of opinion that the cases should be consolidated, the order could then be made. All that is necessary now, is to consolidate the cases for the purpose of taking the proofs. Subsequent consolidation can be made, if proper, when the facts shall have been ascertained which would justify the order.

3rd. To intelligently fix the time now within which the testimony, evidence and proof shall be taken and concluded by the respective parties, as prayed for by the defendant, would be impracticable, in fact impossible. This Court cannot possibly know at this time how much of such proof is to be introduced, how much time consecutively the Master or Commissioner, or counsel could give to the taking of such testimony, or how much

time would be required for the Master, if appointed, to make up his findings of fact, or to dispose of exceptions to his findings, etc. Moreover, this embarkation without chart or compass upon an unknown and untried sea is wholly unnecessary, because Rule 60 of the Rules of Equity Practice provide:

> "It shall be the duty of the Master to proceed with all reasonable diligence in every such reference and with the least practicable delay, and either party shall be at liberty to apply to the Court or a Judge thereof for an order to the Master to speed the proceeding and to make his report and to certify to the Court or Judge the reason for any delay."

4th. The prayer of the defendant to have the testimony, evidence and proof returned to this Court in segregated parts, upon the conclusion of the complainant's case in chief, upon conclusion of the defendant's case in chief, upon conclusion of the rebuttal of the complainant, and upon the conclusion of the sur rebuttal of the defendant, is not only unusual, but apparently of no use. It would subject the Master and the parties to unnecessary trouble and expense.

5th. The prayer of the defendant in the form made for an order of this Court fixing the amount of deposits for fees, costs and expenses of the Commissioner and the Clerk is objectionable in this, that if an order is made it should be general, not specific. Complainants have asked for an order providing that both complainants and defendant, respectively, when and as required, by the Clerk of this Court, shall make such deposit to cover fees, costs and expenses of the Master and the Clerk as

may from time to time be found necessary. The complainants would expect without order to comply with any such requirement.

Complainants respectfully pray that their application should be granted, because it is submitted it conforms to the usual practice of this Court and to the law, is designed to relieve this Court of unnecessary detail, and at the same time it absolutely conserves and protects the rights of both parties to this controversy.

Respectfully submitted,

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